

154 FERC ¶ 61,274
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Empire Pipeline, Inc.

Docket No. RP16-300-001

(Issued March 31, 2016)

ORDER DENYING REHEARING

I. Background

1. In a January 21, 2016 order, the Commission instituted an investigation, pursuant to section 5 of the Natural Gas Act (NGA)¹ to determine whether the rates currently charged by Empire Pipeline, Inc. (Empire) are just and reasonable.² As here relevant, that order set the matter for hearing and directed Empire to file a cost and revenue study within 75 days, based on actual data for the latest 12-month period, including adjustments for known and measurable changes during that period.³ The order also permitted Empire to submit a separate cost and revenue study reflecting adjustments for changes that Empire projects it will undergo during an abbreviated six-month adjustment period following the 12-month period used in the cost and revenue study.⁴

2. On February 22, 2016, Empire sought rehearing of the Commission's directive to file a cost and revenue study. Empire claims the Commission exceeded its authority under NGA sections 5, 10, and 14 when it ordered Empire to file a cost and revenue study and derive rates therein, which Empire characterizes as the functional equivalent of an NGA section 4 rate filing. Empire also claims that the Commission improperly shifted

¹ 15 U.S.C. § 717(d).

² *Empire Pipeline, Inc.*, 154 FERC ¶ 61,029 (2016) (January 2016 Order).

³ *Id.* PP 9-10.

⁴ *Id.* P 10.

the burden of production by directing the cost and revenue study. For the reasons discussed below, we deny Empire's request for rehearing.

II. Commission Determination

3. Empire's request for rehearing primarily focuses on the January 2016 Order's directive that the pipeline file a cost and revenue study, including all schedules required for a section 4 rate proceeding as set forth in section 154.312 of the Commission's regulations, with the exception of Statement P. Empire contends that this requirement exceeds the Commission's authority under the NGA. Empire's arguments in support of this contention are similar to those that have been addressed and rejected by the Commission in prior orders.⁵

4. Requiring Empire to submit the information requested in the January 2016 Order does not improperly transform this section 5 proceeding into a section 4 proceeding, as Empire contends. The January 2016 Order did not require Empire to file any change in its existing rate schedules as contemplated by section 4. Nor did the January 2016 Order place any section 4 burden on Empire to support its existing rates in the required cost and revenue study.⁶

5. Rather, the January 2016 Order directed the submission of a cost and revenue study to enable the Commission to carry out its responsibilities under NGA section 5 to ensure that rates are just and reasonable. As the Commission has explained, the schedules and information required by section 154.312 are necessary to perform an appropriately thorough evaluation of Empire's rates.⁷ With respect to the requirement that Empire file Statements J-1 and J-2 summarizing its billing determinants and showing the derivation of each rate component of each rate, the Commission has explained that, in a section 5 proceeding, the value of such information "is not the actual per-units rates"

⁵ See, e.g., *Bear Creek Storage Co. L.L.C.*, 138 FERC ¶ 61,019 (2012) (*Bear Creek*); *MIGC LLC*, 138 FERC ¶ 61,011 (2012) (*MIGC*); *Ozark Gas Transmission, LLC*, 134 FERC ¶ 61,062 (2011) (*Ozark*); *Kinder Morgan Interstate Gas Transmission LLC*, 134 FERC ¶ 61,061 (2011) (*Kinder Morgan*); *Natural Gas Pipeline Co. of America LLC*, 130 FERC ¶ 61,133 (2010) (*Natural*).

⁶ January 2016 Order, 154 FERC ¶ 61,029 at P 9 ("Empire does not have an NGA section 4 burden in this section 5 proceeding"). See also *Natural*, 130 FERC ¶ 61,133 at PP 14-15; *Kinder Morgan*, 134 FERC ¶ 61,061 at P 22; *Bear Creek*, 138 FERC ¶ 61,019 at PP 28-29.

⁷ See, e.g., *MIGC*, 138 FERC ¶ 61,001 at PP 29-40.

themselves, but the “formulas used to develop” the rates.⁸ “[B]y illustrating how [Empire’s] rates are currently designed, the Statements J-1 and J-2 will enable all participants to determine whether to challenge [Empire’s] existing rate design, or seek lower rates solely by challenging the justness and reasonableness of the cost of service or billing determinants underlying [Empire’s] existing rates.”⁹

6. In order to require Empire to reduce its rates, the Commission will have the burden under NGA section 5 to show that Empire’s current rates are unjust and unreasonable and that any new rates imposed by the Commission are just and reasonable. For this reason, the cases relied upon by Empire – such as *Public Service Comm’n of New York v. FERC* – are inapposite.¹⁰ The Commission is simply requiring an informational filing of the type the *Consumers Energy* court found permissible under NGA section 10(a).¹¹ Consequently, it is inaccurate to conclude the Commission required Empire to make a section 4 filing.

7. Empire takes issue with the Commission’s statement that sections 10(a) and 14(a) of the NGA authorize the Commission to require Empire to submit the information required by the January 2016 Order to carry out its responsibility under NGA section 5 to

⁸ *Id.* P 37.

⁹ *Id.* P 38.

¹⁰ Request for Rehearing at 2. *See Public Serv. Comm’n*, 866 F.3d at 490 (“FERC’s attempted relocation of the expected dispute from § 5 to § 4 would shift the burden of proof from the Commission to the company”); *Consumers Energy*, 226 F.3d at 781 (finding that the Commission exceeded its section 4 authority by requiring “Consumers ... [to] file a petition for rate approval to justify its current rate or to establish a new maximum rate”); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1993) (Commission bears the burden of proof when imposing a rate change); *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1989) (“FERC should bear the burden under § 5 whenever it moves beyond rejection of a proposed rate to the task of redesigning it”).

¹¹ *Consumer Energy*, 226 at 777 (“Should FERC wish [the pipeline] to make periodic informational filings, it may of course so require pursuant to § 10a of the NGA.”) *See also Natural*, 130 FERC ¶ 61,133 at PP 22-24; *Bear Creek*, 138 FERC ¶ 61,019 at PP 44-46; *Kinder Morgan*, 134 FERC ¶ 61,061 at PP 33-35; *MIGC*, 138 FERC ¶ 61,011 at PP 56-58.

ensure that the pipeline's rates are just and reasonable.¹² Empire argues that the required study goes beyond a compilation of factual data by obligating it to file a full section 154.312 cost and revenue study, which includes a derivation of rates.¹³ Empire argues these requirements necessitate Empire "to make the sort of decisions that it is only required to make and support when it files for a section 4 rate change."¹⁴ Empire contends that this requires it to submit a rate based on determinations that may not be the basis for its current rates, and that such rates will be used by the Commission to satisfy its obligation under NGA section 5 to fix the new just and reasonable rate.¹⁵

8. The Commission finds this argument to be meritless.¹⁶ By requiring Empire to submit a full section 154.312 cost and revenue study, including deriving per unit rates, the Commission is not requiring Empire to present its position as to the just and reasonable rates that the Commission should establish in this proceeding. Rather, the Commission is requiring Empire to provide factual information within its possession necessary for an evaluation whether Empire's existing rates are just and reasonable, and, if not, how those rates should be modified.

9. As the Commission clarified in *Ozark Gas Transmission, L.L.C. (Ozark II)*,¹⁷ the Commission is not requiring Empire to set forth its preferred cost allocation and rate design methodology in Statements I and J required by §§ 154.312(o) and (p). Rather, Empire may complete those statements using the cost allocation and rate design methods underlying its existing rates, without indicating whether those methods constitute its currently preferred cost allocation and rate design methodology.¹⁸ Requiring Empire to

¹² January 2016 Order, 154 FERC ¶ 61,029 at n.10. *See Natural*, 130 FERC ¶ 61,133 at PP 16-24; *Bear Creek*, 138 FERC ¶ 61,019 at PP 32-33, 41-46; *Kinder Morgan*, 134 FERC ¶ 61,061 at P 24.

¹³ Request for Rehearing at 6-10.

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 4.

¹⁶ *See Natural*, 130 FERC ¶ 61,133 at PP 16-24; *Bear Creek*, 138 FERC ¶ 61,019 at PP 32-33, 41-46; *Kinder Morgan*, 134 FERC ¶ 61,061 at P 24.

¹⁷ 134 FERC ¶ 61,193 at P 32.

¹⁸ If Empire desires to use a revised cost allocation and rate design methodology in its cost and revenue study, it may do so. But, in that event, it must explain the changes from the existing methodology, as required by section 154.312(o)(3)(iv).

show in its cost and revenue study how its costs are currently allocated among its services and how its per-unit rates are currently designed provides important factual information necessary to the conduct of this NGA section 5 proceeding. Such information is required both for purposes of properly allocating the burden of proof under NGA section 5 and for purposes of enabling the Commission, on its own, to calculate just and reasonable rates for Empire.¹⁹

10. With regard to the burden of proof, the Commission must know what cost allocation and rate design methodologies underlie the pipeline's existing rates to determine who has the burden of justifying a change in those methodologies. For example, as explained in prior cases, in a section 5 proceeding, parties seeking a rate reduction because the pipeline's cost of service has decreased or its throughput has increased, have no burden to support a continuation of the pipeline's existing rate design.²⁰ The NGA "allocates the burden of proving that a rate change is just and reasonable according to the source of the proposed change."²¹ Thus, if Trial Staff and other intervenors do not propose any change in Empire's existing rate design, they have no burden to show that a continuation of the existing rate design is just and reasonable. But if Trial Staff or an intervenor proposes a change in Empire's existing rate design, it would have the section 5 burden to demonstrate both that the existing rate design is unjust and unreasonable and that its proposed changed rate design is just and reasonable. By contrast, if Empire seeks to modify its existing rate design in any subsequent evidence filed in this case, it would only have the burden to show that its proposed new rate design is just and reasonable.

11. Similarly, if a party presents sufficient evidence that Empire's cost of service has decreased and/or its throughput has increased in order to satisfy its section 5 burden to show that Empire's existing rates are unreasonably high, but no party presents evidence to support a change in Empire's rate design, the Commission will then have the burden of persuasion under NGA section 5 to justify and fix new just and reasonable rates using Empire's existing cost allocation and rate design methods. In order to meet that burden, the Commission must, of course, know what those cost allocation and rate design methods are. Thus, Empire's existing cost allocation and rate design methods are

¹⁹ While section 154.312(f) requires the pipeline to show in Statement F-1 "the percentage rate of return claimed and the general reasons therefore," we will permit Empire simply to use an illustrative return on equity in that statement, without taking any position as to whether that return is just and reasonable.

²⁰ See *Bear Creek*, 138 FERC ¶ 61,019 at P 36; *MIGC*, 138 FERC ¶ 61,001 at P 50; *Ozark II*, 134 FERC ¶ 61,193 at P 32.

²¹ *East Tennessee Natural Gas Co.*, 863 F.2d 932, 937 (D.C. Cir. 1988).

squarely within the scope of this section 5 proceeding, and NGA sections 10(a) and 14(a) authorize the Commission to require Empire to submit a cost and revenue study showing its existing cost allocation and rate design methods.

12. The Commission recognizes that developing a cost and revenue study using its existing cost allocation and rate design methods may require Empire to exercise some degree of judgment concerning how those methods should be applied to Empire's current costs and billing determinants. However, the fact Empire may have to exercise some degree of judgment in developing the cost and revenue study required by this order does not improperly shift the burden of proof in this section 5 proceeding to Empire or otherwise violate NGA section 5.

13. The United States Court of Appeals for the District of Columbia Circuit rejected a contention similar to the one made here by Empire in *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 38 (2002)²² and upheld a Commission order directing pipelines to file *pro forma* tariff sheets that went beyond the simple provisions of factual information, as Empire contends. Rather, the order required each pipeline to state its opinion as to whether and how shippers on their system should be permitted to segment their capacity and to provide the specific tariff language implementing such plans. The pipelines asserted that requiring them to submit these filings impermissibly shifted the burden of proof and the Commission had effectively required them to make section 4 filings to defend their current rates. The court observed that the Commission would "shoulder the burden under § 5 of the NGA" with respect to any rate change and found "no violation of the NGA" with respect to "the Commission's determination to extract information from the pipelines relevant to the practical issues."²³

14. Empire also asserts that the Commission's action here is inconsistent with Order No. 710, which revised the requirements for Form 2 and other forms "to provide the Commission and pipeline customers with information that will aid their ability to make a reasonable assessment of a pipeline's cost of service."²⁴ Empire argues that

²² *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 38 (D.C. Cir. 2002) (*INGAA*).

²³ *Id.* See also *MIGC*, 138 FERC ¶ 61,011 at PP 53-54 (discussing *INGAA*); *Bear Creek*, 138 FERC ¶ 61,019 at PP 39-40 (same); *Natural*, 130 FERC ¶ 61,133 at P 17; *Kinder Morgan*, 134 FERC ¶ 61,061 at P 25 (same).

²⁴ *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, FERC Stats. & Regs. ¶ 31,267, at P 12 (2008) (Order No. 710), *order on reh'g and clarification*, 123 FERC ¶ 61,278 (2008) (Order No. 710-A), *remanded*, *American Gas Ass'n v. FERC*, No. 08-1266 (D.C. Cir. Jan. 22, 2010).

Order No. 710 explicitly acknowledged that parties filing a section 5 complaint will have to carry their burden of proof based on the data provided in the Form 2, without the benefit of a section 154.312 cost and revenue study and rate derivation. Empire thus contends it is unnecessary and inappropriate for the Commission to require Empire to file a cost and revenue study and derive rates.²⁵

15. But as the Commission has explained:

[T]he focus of Order No. 710 was to ensure that the Form 2 contains sufficient information to determine whether to initiate a section 5 proceeding. There was no intent in Order No. 710 to restrict the information that the Commission may require once it has determined that the Form 2 data justifies initiating a NGA section 5 proceeding and the Commission determines additional information is required to meet its burden of establishing whether the subject rates are just and reasonable, and if not, to establish just and reasonable rates to be thereafter followed by the pipeline.²⁶

16. Here, the Commission has analyzed Empire's Form 2s for 2013 and 2014, and estimated that Empire's return on equity for those calendar years as 15.8 percent, and 20.2 percent, respectively. Empire has not contested any aspect of the Commission's analysis and the determination that Empire's current rates may be unjust and unreasonable. In order to carry out a further examination of Empire's rates, the Commission requires additional information that is not included in the Form 2.²⁷

17. The information sought here is similar to data used in an NGA section 4 proceeding because the same data and calculations are needed to change rates regardless of whether they are changed pursuant to NGA section 4 or section 5.²⁸ Consequently, this information solidly fits within the scope of this proceeding and Empire, who possesses this data, has been requested to provide it.

²⁵ Request for Rehearing at 6-8.

²⁶ *Natural*, 130 FERC ¶ 61,133 at P 26.

²⁷ See *Bear Creek*, 138 FERC ¶ 61,019 at P 43 ("the Commission never intended that the party bearing the burden of proof in a section 5 proceeding must carry that burden based solely on the data in the pipeline's Form 2").

²⁸ See *Natural*, 130 FERC ¶ 61,133 at P 20; *Bear Creek*, 138 FERC ¶ 61,019 at P 41.

18. Empire contends that the Commission is improperly requiring the pipeline to “propose” a new rate that the Commission will use as a basis for fixing the new just and reasonable rate.²⁹ As explained in prior cases, however, the rate design used in Empire’s cost and revenue study will not be treated as a rate design proposal, nor will it serve as evidence of Empire’s preferred rate design or cost allocation methods. Instead, details regarding matters such as cost allocation and rate design will serve as important factual information necessary for this NGA section 5 proceeding, both for purposes of properly allocating the burden of proof under section 5 and for enabling the Commission, on its own, to calculate just and reasonable rates.³⁰

19. With regard to Empire’s contention that the Commission has improperly shifted the burden of production and proof by requiring Empire to file a cost and revenue study and derive rates, the January 2016 Order specifically stated that Empire does not have an NGA section 4 burden in this section 5 proceeding.³¹ In fact, in an attempt to avoid placing inappropriate burden on Empire, the January 2016 Order exempted Empire from submitting certain types of information.³²

20. The D.C. Circuit has held that the statutory burden of proof requirement in a section 4 proceeding “relates to the burden of persuasion ... not to the burden of production, and thus the identity of the party submitting evidence is not dispositive.”³³ Similarly, in this section 5 proceeding, the Commission has the burden of persuasion to show that Empire’s existing rates are unjust or unreasonable and may rely on any evidence in the record to satisfy that burden, regardless of the source of that evidence. The information required by the January 2016 Order – a cost and revenue study – includes information possessed by Empire and encompasses cost allocation and rate design methods underlying Empire’s existing rates. Empire is in the best position to

²⁹ Request for Rehearing at 4.

³⁰ *Bear Creek*, 138 FERC ¶ 61,019 at P 35; *Kinder Morgan*, 134 FERC ¶ 61,061 at P 30.

³¹ January 2016 Order, 154 FERC ¶ 61,029 at P 9.

³² *Id.* The January 2016 Order exempted Empire from filing Schedule P and nine months of post-base period adjustment data required by section 154.303(a). *Id.* P 9.

³³ *Complex Consolidated Edison Co. of New York, Inc. v. FERC*, 165 F.3d 992, 1008 (D.C. Cir. 1999) (citing *City of Winnfield, La. v. FERC*, 744 F.2d 871 (D.C. Cir. 1984)).

demonstrate how it designed its rates.³⁴ This information will assist the Commission in carrying out its responsibilities under NGA section 5. Thus, we do not find the burden of proof and production has shifted.³⁵

The Commission orders:

The Commission hereby denies Empire's request, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁴ See *Natural*, 130 FERC ¶ 61,133 at P 15; *Bear Creek*, 138 FERC ¶ 61,019 at P 47.

³⁵ See *Bear Creek*, 138 FERC ¶ 61,019 at P 47; *MIGC*, 138 FERC ¶ 61,011 at PP 59-60; *Kinder Morgan*, 134 FERC ¶ 61,061 at PP 31-32.